In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1267

ALPHONSE CUZZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The principal issue presented by this case is whether evidence collected through wire interceptions, conducted under court orders issued on the basis of findings of probable cause and necessity as required by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2518, should be suppressed because of the manner in which the then Attorney General personally authorized the submission of the wiretap application to the issuing court.

After a jury-waived trial in the United States District Court for the Southern District of New York petitioner was convicted of conspiring to use facilities in interstate commerce with the intent to conduct an illegal gambling business and transmit information concerning bets and wagers in violation of 18 U.S.C. 371, 1084,

1952. Petitioner was sentenced under the provisions of 18 U.S.C. 3651 for a term of three years, six months to be served in jail and the remainder suspended. He was also placed on probation for a term of four years and fined $1,000. The court of appeals affirmed without opinion.

The facts were stipulated at trial. The stipulation established that petitioner was a member of a conspiracy conducting an interstate gambling and bookmaking business centered in Westchester County, New York, with gross revenues of about $300,000 per week. The evidence in this case was based in part on information obtained from four court-authorized wiretaps conducted pursuant to orders issued by the Southern District of New York on July 2, 1969, August 11, 1969, August 27, 1969 and September 12, 1969. Petitioner moved to suppress evidence derived from these court-authorized wiretaps on the ground that the applications for the four orders had not been properly authorized within the Department of Justice to be submitted to the issuing judge as required by 18 U.S.C. 2516.

The government opposed this motion and filed affidavits of the Executive Assistant to the Attorney General, Sol Lindenbaum, and Assistant Attorney General Henry Petersen which showed the procedure followed within the Department of Justice in authorizing the submission of the applications.[1] In the instant case after review and recommendation within the Department of Justice in accord with the established pro-

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[1] The general procedure is set forth in detail in our petition in *United States* v. *Giordano*, No. 72-1057, certiorari granted, March 26, 1973.

cedure, the then Attorney General John N. Mitchell personally approved the submission of the applications for the orders of July 2, August 11, and September 12, 1969 and personally initialed the memorandum addressed to Assistant Attorney General Will Wilson. With respect to the order of August 27, 1969, the Attorney General was contacted telephonically by his Executive Assistant, Sol Lindenbaum, who advised him orally of the substance of the memorandum and recommendation received from the Criminal Division on the application. The Attorney General orally approved the recommendation of the Criminal Division, and Sol Lindenbaum then caused the Attorney General's initials to be affixed to the memorandum addressed to Assistant Attorney General Wilson. Under the standard procedure, after authorization in the Office of the Attorney General, letters were dispatched to the government attorney in the field notifying him that he was authorized to apply for the wiretap order. These letters were sent over the name of Assistant Attorney General Will Wilson, and the letter and application seemed to indicate, erroneously, that it was Assistant Attorney General Wilson who was authorizing the application. Mr. Wilson's signature was affixed to these letters by then Deputy Assistant Attorney General Henry E. Petersen in accordance with the authorization of Mr. Wilson and the standard procedures of the Criminal Division.

Petitioner does not challenge the validity of the Department of Justice procedure in those three instances in which the former Attorney General personally initialed the memorandum. He does claim, however, that the telephonic authorization by Attorney General Mitchell to his Executive Assistant was insufficient

under 18 U.S.C. 2516(1). Petitioner argues principally that the authorization of the application was not the personal action of the Attorney General because Mr. Lindenbaum merely "advised him orally of the substance of a memorandum of recommendation received from the Criminal Division and of a proposed memorandum of approval from him to Will Wilson" (Pet. 14). Petitioner claims that this was insufficient and the "minimum requirement" for personal action by the Attorney General was that the two documents should have been actually read to him verbatim (Pet. 14). Finally, petitioner apparently concedes that the application properly identifies the Attorney General as the authorizing officer as required by 18 U.S.C. 2518(1)(a); but that, since, in petitioner's view, the Attorney General's personal action on the August 27 application was insufficient, the identification of him as the authorizing officer is incorrect (Pet. 14-16).

Petitioner's argument is unsound because it assumes that the language of 18 U.S.C. 2516(1) that, "The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction," requires the Attorney General to conform to some specific mechanical procedure in determining whether to grant his approval. But the statute does nothing of the kind. No specifics are provided as to findings, discretion or procedure. The requirement is simply to authorize. No matter how strictly the statute is construed, the personal and specific authorization by the Attorney General, whether in writing or by telephone, fully and literally complies. Petitioner's argument is, therefore, without merit.

The instant case, however, does on its facts involve another issue, which is not specifically raised by petitioner, but is involved in a petition for a writ of certiorari which the government has filed in *United States* v. *Chavez,* No. 72-1319, and in the petition filed by the defendants in *Fiorella* v. *United States,* No. 72-893, and *Cox* v. *United States,* No. 72-5278.[2] In *Chavez,* the court of appeals held that where the Attorney General actually authorized the wiretap application, the application for the wiretap was invalid where it inadvertently seemed to indicate, as here, that it was actually authorized by an Assistant Attorney General. A contrary result was reached in *United States* v. *Fiorella,* 468 F. 2d 688 (C.A. 2), and *United States* v. *Cox,* 462 F. 2d 1293 (C.A. 8).[3] If we are correct in our submission that the procedure followed here satisfied 18 U.S.C. 2516(1) because the Attorney General authorized personally the application in this case, then the issue raised in *Chavez, Fiorella* and *Cox* is also implicitly present here. Accordingly, in light of the pendency of the petitions for certiorari in those cases, and the conflict among the courts of appeals on this issue, the Court may wish to hold this case pending the determination of those petitions.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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[2] In the latter two cases we have filed a supplemental memorandum withdrawing our opposition to the granting of the writs of certiorari in those cases.

[3] The same contrary result was also reached in *United States* v. *Bobo,* No. 71-2077 (C.A. 4), decided April 23, 1973, and *United States* v. *Roberts,* No. 72-1514 (C.A. 7), decided April 3, 1973, petition for a writ of certiorari pending, No. 72-1475.